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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1780~~ 70-242

SANDRA ADICKES and JAMES HORELICK,

Petitioners,

—against—

HOWARD R. LEARY, Police Commissioner of New York City, FRANK S. HOGAN, District Attorney of New York County, ANDRE CLERMONT, Custodian, Washington Irving High School, GERARD OAK, Principal, Washington Irving High School,

Respondents.

BRIEF OF APPELLEES LEARY, CLERMONT AND OAK IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1786

SANDRA ADICKES and JAMES HORELICK,

Petitioners,

—against—

HOWARD R. LEARY, Police Commissioner of New York City, FRANK S. HOGAN, District Attorney of New York County, ANDRE CLERMONT, Custodian, Washington Irving High School, GERARD OAK, Principal, Washington Irving High School,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

The petitioners seek to have this Court review by writ of certiorari an order of the United States Court of Appeals for the Second Circuit, entered on January 7, 1971, which unanimously affirmed the dismissal of the complaint. A motion for leave to file a petition for rehearing was granted by the Court of Appeals on March 5, 1971. On that same date, the petition for rehearing was denied.

The complainants, two New York City school teachers, brought an action for damages under 42 U.S.C. §1983 and §1985 (two sections of the Civil Rights Act), alleging that

their constitutional rights had been violated when they were arrested for criminal trespass, resisting arrest, interfering with an arrest and harassment.

Question Presented

1. Did the plaintiffs' complaint allege a cause of action under 42 U.S.C. §1983 or under 42 U.S.C. §1985?

Facts

During October 1968 the United Federation of Teachers called an illegal strike against the New York City Board of Education (A.5).* On October 16, John Doar, then Chairman of the New York City Board of Education, issued a statement authorizing the District Superintendents to open every school (A.5, 17). In his statement, Mr. Doar said that the "District Superintendent may of course order the school closed against real threat to the safety of persons in or around the school", but that "this responsibility may not be used as a ruse to keep any school closed" (A.17).

By a letter dated October 17, 1968, Nathan Brown, Executive Deputy Superintendent of Schools, instructed all District Superintendents to designate a teacher of each school to assume responsibility for the supervision of the school "[w]herever a competent teacher of a school appears and is willing to assume responsibility for supervision of the school" (A.5, 18). Such designation was to be made in writing, on official stationery, and addressed to the school custodian (A.18). In the event that the school could not be opened because the custodian refused to open it or was not present, the District Superintendent was to "call the bor-

* Unless otherwise indicated numbers in parentheses refer to the Appellants' Appendix.

ough custodial headquarters,—as a second step, call the office of Mr. Hudson and Mr. McLaren" (A.18). Pursuant to these instructions, District Superintendent Theresa G. Rakow authorized Mr. Edward Williams to be the "Teacher-in charge" of Washington Irving High School (A.19).

The complaint alleges the following:

On October 17, 1968, at about 9:30 A.M. the plaintiffs, together with Mr. Williams, other teachers, and students attempted to enter Washington Irving High School (A.6). Mr. Williams had with him the letter of authorization designating him "Teacher-in-charge" (A.6). The police and defendants Clermont, school custodian, and Oak, school principal, refused to allow them to enter (A.6). At about 11:30 A.M. plaintiff Horelick "under the delegated authority of Mr. Williams" entered the school (A.6-7). [The complaint offers no explanation of how much authority was delegated.] While in the school, the police "commenced beating" Mr. Horelick "about his face, body and limbs" after which he was removed from the building (A.7). Mr. Horelick was arrested and charged with criminal trespass [Penal Law §140.10] upon the complaint of the custodian, defendant Clermont, who stated in the complaint that Mr. Horelick remained on the premises without authority after he was told to leave (A.7, 20). He was also charged by the police officers with resisting arrest [Penal Law §35.25] (A.7, 20). Subsequently Mr. Horelick was charged additionally with the crime of harassment [Penal Law §240.25] (A.7).

On October 20, 1968, plaintiff Horelick, "pursuant to the same authorization", again attempted to enter the High School (A.8). He was arrested and again charged with criminal trespass (A.8, 22).

Plaintiff Adickes was arrested for interfering with the arrest of plaintiff Horelick (A.7, 21). About June 11, 1969, plaintiff Adickes was advised by her attorney that the District Attorney's office had information that, upon being arrested, Miss Adickes had kicked a policeman in the groin (A.13-14). She was told that if the information were not true, the case would be dismissed. Miss Adickes "believing her attorney and the representations of the agents of defendant Hogan" submitted to a lie detector test which she "passed" (A.14-15). The District Attorney refused to dismiss the case against her for interfering with an arrest. (A.15).

ARGUMENT

The complaint was properly dismissed for failure to state a claim for relief under 42 U.S.C. § 1983 or 42 U.S.C. § 1985.

(1)

There appears to be disagreement among federal courts as to whether a non-meritorious claim under the Civil Rights Act should be dismissed for lack of jurisdiction under 28 U.S.C. §1343 or for failure to state a claim. *Meredith* v. *Allen,* 397 F. 2d 33, 35 (6th Cir., 1968); *Agnew* v. *City of Compton,* 239 Fd 2d 226, 229 fn. 3 (9th Cir. 1957), cert. den. 353 U.S. 959 (1957). We shall show that the complaint herein fails to state a claim upon which relief under the Civil Rights Act can be granted.

(2)

For the purpose of a motion to dismiss, the material allegations in the complaint are taken as admitted. Such a motion, however, is granted if it appears "to a certainty"

that the plaintiffs, would not be entitled to relief under any state of facts which could be proved in support of their claim. To defeat a motion to dismiss for failure to state a claim under §1983 it is incumbent on the plaintiffs to allege specific facts. *Agnew* v. *City of Compton,* 239 F. 2d 226, 231 (9th Cir. 1956), cert. den. 353 U.S. 959 (1957); *Powell* v. *Workmen's Compensation Board* 327 F. 2d 131, 137 (2d Cir., 1964); *Friedman* v. *Younger,* 282 F. Supp. 710, 713 (C.D., Cal., 1968). It is not enough to state bare conclusory allegations. *Pugliano* v. *Staziak,* 231 F. Supp. 347, 349 (W.D. Pa., 1964), affd. 345 F. 2d 797 (3rd Cir., 1965).

Section 1983 creates a cause of action against individuals acting under color of state authority to deprive a citizen of federally protected civil rights secured by the Fourteenth Amendment. *Monroe* v. *Pape,* 365 U.S. 167 (1961).

The complaint alleges one cause of action under §1983 against defendants Leary, Clermont and Oak. It states that on or after October 17, 1968, defendants Clermont and Oak "acting individually and/or in concert conceived a plan for pressing charges against plaintiff Horelick and for urging defendant Hogan to press charges against both plaintiffs, solely for purposes of punishment without due process of law" (A.8). It goes on to say that plaintiffs rights "under the First Amendment including but not limited to the right to teach freely, without interference" have been infringed (A.10).

These general allegations are not supported by any factual averments in the complaint. The complaint alleges only that as a result of the teachers' strike, the Executive Deputy Superintendent of Schools instructed the District Superintendents to designate a Teacher-in-Charge, who

would be allowed to open each school (A.18). If the custodian refused to open the school, the District Superintendent or the Teacher-in-Charge was to "call the borough custodial headquarters—or as a second step, call the office of Mr. Hudson and Mr. McLaren" (A. 18). Mr. Edward Williams was authorized to be Teacher-in-Charge of Washington Irving High School.

The plaintiffs in the company of Mr. Williams sought to enter the school, but they were denied entry by the police (A. 6). The complaint alleges that at about 11:30 A.M., plaintiff Horelick "under the delegated authority of Mr. Williams", entered the school and was arrested (A. 17). On October 20, 1968, plaintiff Horelick again "pursuant to the same authorization" again attempted to enter the school and again was arrested.

The factual allegations of the complaint show that the actions of the defendants which culminated in the arrest of the plaintiffs were justified. Only Edward Williams was authorized to open Washington Irving High School. There was no provision in the letter of authorization allowing Williams to delegate his authority. The factual averments of the complaint show that the plaintiff Horelick without authority entered a closed school. This obviously made him a trespasser. The complaint and an exhibit annexed thereto show that the plaintiff Adickes was charged with resisting arrest in that she attempted to prevent a peace officer from effecting an authorized arrest and that she was advised that it was claimed that she had kicked a policeman in the groin. There is no violation of a constitutional right where, as in this case, the police had cause, as appears from the complaint itself, to make the arrests. *Beauregard* v. *Wingard*, 362 F. 2d 901, 903 (9th Cir., 1966). Even if the arrests had resulted from a law officer's "honest misunderstanding

of the law or facts", no course of action under §1983 would lie. *Agnew* v. *City of Compton*, 239 F.2d 226, 231 (9th Cir., 1956), cert. den. 353 U.S. 159 (1957); *Joyce* v. *Ferrazzi*, 323 F. 2d 931, 933 (1st Cir., 1963). The statements of the occurrences on October 17 and October 20, 1968, in the complaint do not support the general allegations that the defendant sought to punish the plaintiffs without due process of law.

(3)

Plaintiffs' cause of action under §1985 of Title 42 should also be dismissed. Under this section, the elements of a cause of action are (1) that defendants conspired, (2) that the purpose of the conspiracy was to deprive plaintiff of equal protection of the laws or equal privileges and immunity under the law, (3) that there was a purposeful intent to discriminate and (4) that defendants acted under color of state law or authority. See *Snowden* v. *Hughes*, 321 U.S. 1, 7-8 (1943); *Hoffman* v. *Halden*, 268 F. 2d 280, 292 (9th Cir., 1959); *Powell* v. *Workmen's Compensation Board*, 327 F. 2d 131, 137 (2d Cir., 1964). The complaint fails to allege any facts which satisfy the requirements under this section.

Plaintiffs' allegation respecting the existence of a conspiracy are clearly insufficient. The complaint alleges that defendants Clermont and Oak, acting individually and/or in concert, conceived a plan for pressing charges against plaintiff Horelick (A. 8). A similar general allegation alleges that defendants Clermont and Oak, acting in concert with the agents of defendant Leary, urged defendant Hogan not to drop the criminal charges against the plaintiff. No additional facts were pleaded to support these allegations. In *Powell* v. *Workmen's Compensation Board*,

327 F. 2d 131 (2d Cir., 1964), the court stated that the complainant, alleging the existence of a conspiracy,

> "was bound to do more than merely state vague and conclusionary allegations respecting the existence of a conspiracy. It was incumbent upon him to allege with some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy." 327 F. 2d at p. 137.

The plaintiffs here have not done what the Court required in *Powell*. Indeed the facts alleged in the complaint show that no conspiracy existed. The police made the arrests only because the plaintiffs did not follow the procedures established for opening schools during the school strike. The plaintiffs had no authority to enter the school, and consequently their arrests and prosecutions were not unreasonable. Plaintiffs' allegations of conspiracy which suggest that the District Attorney's responsibility is subject to the urging of others not to drop particular charge is clearly insufficient. The District Attorney does not violate an accused's civil rights by prosecuting him for a crime.

Plaintiffs' claims are thus reduced to the claim that they are about to be tried for offenses on the complaint of certain witnesses and that the District Attorney refused to drop the charges. These allegations are insufficient to establish a conspiracy under §1985. See *Powell* v. *Workmen's Compensation Board*, 327 F. 2d 131, 137 (2d Cir., 1964); *Kamsler* v. *Zaslawsky*, 355 F. 2d 526 (7th Cir., 1966); *Agnew* v. *City of Compton*, 239 F. 2d 226, 231 (9th Cir., 1956), cert. den. 353 U.S. 959 (1957).

Plaintiffs' cause of action under §1985 is further defective. There are no allegations indicating that the conspiracy had a purposeful intent to discriminate between classes or in-

dividuals. Where it is not alleged that the purpose of the acts complained of was to discriminate, a cause of action under 1985 cannot be sustained. *Snowden* v. *Hughes,* 321 U.S. 1, 9-10 (1943); *Burt* v. *City of New York,* 156 F. 2d 791, 792 (2d Cir., 1946); *Hoffman* v. *Halden,* 268 F. 2d 280, 290 (9th Cir., 1959). The most that is suggested in the complaint is that the defendants sympathized with the strike then in process and acted out of malice for plaintiffs (A.1, 12). An allegation that the defendants acted wilfully or maliciously does not satisfy the requirement. *Snowden* v. *Hughes,* 321 U.S. 1, 10 (1943).

Finally, plaintiffs' charges of conspiracy as against defendant Leary are further deficient since the complaint does not allege that defendant Leary was in any way personally involved in the alleged conspiracy (A.6, 9, 13). A police chief or commissioner, although he has general supervision over the conduct of the police officer who committed the allegedly wrongful acts, is not responsible under the Civil Rights Act unless he was present or personally directed such acts or participated in them. *Sandberg* v. *Daley,* 306 F. Supp. 277, 278 (N.D. Ill., E.D., 1969); *Patrum* v. *Martin,* 292 F. Supp. 370, 371 (W.D.Ky., 1968). See *Runnels* v. *Parker,* 263 F. Supp. 271, 273-274 (C.D. Cal., 1967); *Jordan* v. *Kelly,* 223 F. Supp. 731, 737 (W.D. Mo., 1963).

CONCLUSION

The petition for writ of certiorari should be denied.

June 24, 1971.

Respectfully submitted,

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